Taxation: rules to prevent the misuse of shell entities for tax purposes

2021/0434(CNS) - 17/01/2023 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 593 votes to 21, with 8 abstentions, following a special legislative procedure (consultation of Parliament), a legislative resolution on the proposal for a Council directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU.

Members pointed out that the misuse of shell entities for tax purposes leads to a reduction in tax liability and tax loss within the Union. They consider that it is therefore essential that this Directive sets ambitious and proportionate standards for the definition of common minimum substance requirements, for the improvement of exchange of information between national tax administrations and for the dissuasion of the use of shell entities promoted by certain intermediaries.

The European Parliament approved the Commission proposal subject to the following amendments:

Identification of companies that do not meet minimum substance indicators

According to Members, Member States should require undertakings meeting the following cumulative criteria to report to the competent authorities of Member States:

- more than 65% (instead of 75%) of the revenues accruing to the undertaking in the preceding two tax years is relevant income of the company's revenue in the previous two tax years is relevant income;

- the undertaking is engaged in cross-border activity on any of the following grounds: (i) more than 55% (instead of 60%) of the book value of the undertakings assets that fall within the scope of Article 4, points (e) and (f), was located outside the Member State of the undertaking in the preceding two tax years; (ii) more than 55% (instead of 60%) of the undertakings relevant income is earned or paid out via cross-border transactions;

- in the preceding two tax years, the undertaking outsourced the administration of day-to-day operations and the decision-making on significant functions to a third party.

Indicators of minimum substance for tax purposes

Undertakings meeting the criteria declare in their annual tax return should, for each tax year, whether they meet the following indicators of minimum substance:

- the undertaking has own premises in the Member State, premises for its exclusive use or premises shared with entities of the same group;

- the undertaking has at least one own and active bank account or e-money account in the Union through which the relevant income is received;

- one or more directors of the undertaking are qualified and authorised to take decisions in relation to the activities that generate relevant income for the undertaking or in relation to the undertakings assets;

- the majority of the full-time equivalent employees of the undertaking have their habitual residence as set out in Regulation (EC) No 593/2008 in the Member State of the undertaking, or are at no greater distance from that Member States insofar as such distance is compatible with the proper performance of their duties.

Undertakings should accompany their tax return declaration with documentary evidence including:

- an overview of the structure of the undertaking and associated enterprises and any significant outsourcing arrangements, including the rationale behind the structure, described in the context of a standardised format;

- a summary report of the documentary evidence submitted under this paragraph, containing in particular: (i) a brief description of the nature of the activities of the undertaking; (ii) the number of employees on a full-time equivalent basis; (iii) the amount of profit or loss before and after taxes.

Rebuttal of the presumption

Member States should take measures to enable undertakings that are presumed not to have minimum substance to rebut this presumption, without undue delay and excessive administrative costs, by providing any additional supporting evidence of the business activities which they perform to generate relevant income.

To this end, undertakings should provide the following additional evidence: (i) a document allowing to ascertain the business rationale behind the establishment of the undertaking in the Member State where the activity is performed; (ii) information on the profiles of full-time, part-time and freelance employees while ensuring high levels of data protection and privacy.

The Member State should consider a request for the rebuttal of the presumption within a period of nine months after the introduction of the request and it should be considered to be accepted in the absence of an answer from the Member State after the expiry of that nine-month period.

Where a Member State considers that an undertaking has satisfactorily rebutted a presumption of lack of substance, it should be able to adopt a decision certifying that the undertaking has minimum substance for tax purposes. This decision should remain valid for up to 5 years from the date of adoption of the decision.

Tax consequences of not having minimum substance

Where an undertaking does not have minimum substance for tax purposes in the Member State where it is resident for tax purposes, that Member State should deny any request for a certificate of tax residence to the undertaking for use outside the jurisdiction of that Member State.

When denying a request for such certificate, the Member State should issue an official statement duly justifying such decision and prescribing that the undertaking is not entitled to the benefits of agreements and conventions that provide for the elimination of double taxation of income, and, where applicable, capital, or of international agreements with a similar purpose or effect.

Penalties

Members stressed that Member States must share relevant information to which they have access, implement systems supporting the exchange of that information and, as a final step, enforce proposed sanctions against non-complying entities.

Penalties should include (i) an administrative pecuniary sanction of at least 2% of the undertakings revenue in the relevant tax year, if the undertaking that is required to report does not comply with such requirement for a tax year within the prescribed deadline and an administrative pecuniary sanction of at least 4% of the undertakings revenue if the undertaking that is required to report makes a false declaration in the tax return.

Request for a joint tax audit

Where the competent authority of one Member State has reason to believe that an undertaking which is resident for tax purposes in another Member State has not met its obligations under this Directive, the former Member State may, specifying such reasons, request the competent authority of the latter to conduct a joint tax audit of the undertaking. If the requesting competent authority is not able to conduct a joint tax audit due to legal reasons, the competent authority of the requested Member State should initiate a national audit within one month from the date of receipt of the request.

Review

No later than five years after the date of transposition of the Directive, the Commission should present a report on the implementation and operation of the Directive. Where appropriate, the report would be accompanied by a review with a view to increasing the effectiveness of the Directive and a legislative proposal to amend the Directive.

The report should assess:

- the impact of this Directive on tax revenues in Member States, on tax administrations capacities and in particular, whether there is a need to amend this Directive;

- whether it would be appropriate to add a substance indicator based on pre-tax profit per employee and to extend the obligation to report on indicators of minimum substance for tax purposes set out in that Article to regulated financial undertakings and, if necessary, review the exemption granted to them.